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# United States Supreme Court

October Term, 1952 / 1953

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ANTHONY WILKO,

*Petitioner,*

vs.

JOSEPH E. SWAN, ET AL,
individually and doing business under the firm name and style of Hayden Stone & Co.

*Defendants-Respondents,*

*and*

HAVEN B. PAGE,

*Defendant.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on January 15, 1953.

### Opinions Below

The opinion of Judge Goddard of the United States District Court for the Southern District of New York herein is reported in 107 Fed. Supplement 75. The opinion of the Circuit Court of Appeals herein is reported in 201 Fed. 2d 439.

## Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on January 15, 1953. The jurisdiction of this Court is invoked under 28 U. S. Code Annotated, Sections 1252 and 1254.

## Questions Presented

The questions presented in this case are very important and affect virtually all members of the securities professions and officers and employees of all nationally registered securities exchanges as well as virtually every buyer and seller of securities throughout the United States and are briefly:

(1) Whether Sections 77 l and 77 n of the Securities Act of May 27, 1933 as amended (Title 15, Chapter 2a) U. S. Code Annotated (C38- Title 1, 48 Stat. 74) render compulsory arbitration clauses contained in fine print at the end of customer's agreements signed between petitioner (customer) herein, and respondents (brokerage house) invalid and not binding upon petitioner (customer)

and

(2) Whether the Federal Arbitration Act of 1925, predating the Securities Act of 1933 by some eight years renders the non-waiver provisions of the latter act invalid?

and

(3) Whether an arbitration can be supervised by the District Court in a manner contrary to settled law and Section 77n of the Securities Act of 1933 as Amended. (Title 15, Chapter 2a) U. S. C. A. (C38—Title 1, 48 Stat. 74)?

## Statutes Involved

The pertinent statutory provisions are as follows:

(1) Sections 12 (2) and (14) of the Securities Act of 1933, and Sections 3 and 10 of the Federal Arbitration Act of 1925.

## Statement of Facts

(1) Petitioner herein was a customer of the firm of Hayden Stone & Co., members of the New York Stock Exchange, and respondents herein. Petitioner's complaint herein is dated January 14, 1952 (see pages 2-4 inclusive) of the transcript of record herein, and alleges that:

(2) Respondents sold to petitioner 1,600 shares of the common stock of Air Associates, Inc., a corporation of the State of New Jersey on or about January 17, 1951, and petitioner paid respondents Hayden Stone & Co. therefor the sum of $29,517.54. That on or about February 2 and 3, 1951, petitioner sold through the respondents herein the 1,600 shares abovementioned on the New York Curb Exchange for a total price of $25,628.61, thereby incurring a loss of $3,888.88.

(3) That the above purchase and sale were made by the use of the means and instrumentalities of interstate commerce, including the facilities of the New York Curb Exchange, a nationally registered securities exchange, the United States Mails, and that the original sale to the petitioner herein resulted from communications to the petitioner by the respondents herein, which included untrue statements of fact, and omissions to state material facts necessary to make the respondent's statements not misleading, in the light of the circumstances under which these statements were made.

(4) That respondents herein moved on February 29th, 1952 in the U. S. District Court for the Southern District of New York to stay all proceedings herein pursuant to Title 9. U. S. C. Sec. 3, (1950 Supplement) until an arbitration could be had as provided for in the last clause of the customer's agreement entered into between petitioner and respondents on May 2, 1950.

(5) The Securities & Exchange Commission was granted permission by the United States District Court to intervene herein as amicus curiae. The Securities & Exchange Com-

mission so intervened and submitted briefs as well as oral arguments supporting petitioner's contentions and allegations herein.

(6) After the trial of this action in the United States District Court for the Southern District of New York, Judge Henry W. Goddard handed down a decision on May 23, 1952, denying respondent's motion for a stay pending arbitration and an order to this effect was entered on June 11, 1952.

(7) Respondents filed a notice of appeal to the Circuit Court of Appeals for the 2d Circuit on June 18, 1952.

(8) While petitioner stipulated the correctness of the transcript of record as submitted to him on July 24, 1952, respondents failed to amend this record so as to show that on August 28, 1952, Judge Edelstein of the United States District Court for the Southern District of New York again denied a motion of respondents for a further stay of all proceedings herein pending a hearing of the appeal in the Circuit Court of Appeals for the 2d Circuit.

(9) After a further intervention by the Securities & Exchange Commission in support of plaintiff's (petitioner's) contentions and the submission of briefs and oral arguments, the Circuit Court of Appeals in a *divided opinion* handed down a decision on January 15, 1953, reversing Judge Goddard, and remanding the case to the U. S. District Court for further proceedings.

## Specification of Errors to be Urged

The Court of Appeals erred:

(1) In holding that there was no civil liability upon respondents for their fraud upon petitioner misrepresentation of material facts and omissions to state material facts necessary to make respondent's statements not misleading in inducing petitioner to purchase 1,600 shares of the common stock of Air Associates, Inc., on or about January 17, 1951. This serious fraud has been completely ignored

both by the majority of the Circuit Court of Appeals and by Respondents and their Counsel.

(2) In holding that the clause in the customer's agreement compelling the customer-petitioner to submit to compulsory arbitration in the event of a dispute is not one waiving compliance with the Securities Act of 1933, of which Section 77n thereof reads as follows:

> "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this sub-chapter, and of the rules and regulations of the Commission shall be void."

(3) In holding that both Sections 12 (2) and 14 of the Securities Act of 1933 are merely permissive and do not require compliance on the part of respondents herein. This holding is in defiance of the provisions of the Securities Act of 1933, as provided in Section 12 (2) and Section 14 thereof, which respondents admit in the customer's agreement are valid and binding upon them, by using the words Securities and Exchange Act of 1934 and present and future acts amendatory thereof or supplementary thereto. Congress does not enact permissive legislation, except in rare instances. If the non-waiver provisions above named were and are merely permissive there would have been no object on the part of Congress in enacting them.

(4) In holding that under the Federal Arbitration Act of 1925 (an act antedating the Securities Act of 1933 by nearly 8 years) permits arbitrators to act outside their status as laymen, as lawyers, judges and jurors in spite of their lack of professional preparation and experience in the practice of law.

(5) In assuming that arbitrators would be bound to decide this dispute in accordance with the provisions of Section 12 (2) of the Securities Act of 1933. Both the

[1] See photostatic copy of customers agreement Exhibit C in Appendix.

majority of the Circuit of Appeals and opposing counsel have failed to consider the self-interest of the arbitrators particularly, if the arbitration were to be conducted by the Arbitration Committee of the New York Stock Exchange, few, if any, of whose members are lawyers and all of whom have a direct personal interest in increasing the income and assets of their fellow members of the New York Stock Exchange, and in reducing the liabilities and disbursements of such members. No evidence was adduced by respondent's at any time to prove that the members of panels of other arbitration agencies are not just as biased in their approach to disputes between wealthy stock exchange houses and relatively poor customers. The entire customer's agreement involved herein was obviously worded by shrewd attorneys, to achieve exculpation for their clients, to circumvent federal statutes and settled law, and to obviate compliance with legal mandates to the contrary.

(6) In ruling (by the majority) that the Court could not find in the purpose or in the language of the 1933 Act a policy argument strong enough to over-ride the policy of the Arbitration Act (enacted some eight years before the Securities Act of 1933) and further that "If Congress had intended to forbid arbitration in a suit based on Section 12 (2), we believe that it would have expressed such intent."

(7) In holding that the absence of Haven B. Page from the arbitration agreement did not enable the plaintiff to escape his contract to arbitrate. There is no privity of contract between the aforesaid Page and the petitioner herein. The Supreme Court of the United States may note from the transcript of the record submitted herewith that Haven B. Page, was not an appellant to the Circuit Court of Appeals herein and is specifically and purposely segregated as a *defendant* herein.

(8) In holding that the District Court has the authority to supervise the arbitration proceeding to safeguard petitioner's rights under the 1933 Act. This erroneous judgment is so conspicuous that it is almost unbelievable to find it in

the opinion of even a divided section of one of our Federal Courts.

(9) In holding that a ruling in a case involving similar statutes (15 U. S. C. 78p (b) and 78AA) in the United District Court for the Eastern District of Louisiana (*Walet* vs. *Jefferson Lake Sulphur Company* 104 Fed. Supplement 20) was not in conflict with the Circuit Court's ruling in the instant case. Respondents in paragraph 2 of the customer's agreement under consideration bind themselves "to comply with all transactions made by you are to be subject to" * * * the provisions of the Securities Exchange Act of 1934 and present and future acts amendatory thereof or supplemental thereto and to the rules and regulations of the Securities and Exchange Commission including the provisions virtually identical with Sections 77n and 77l of the Securities Act of 1933 quoted supra. This decision of the District Court has recently been upheld by the United States Court of Appeals for the Fifth Circuit which held specifically that the "Appellee, * * * should not be held to have waived the benefits of Section 16 (b) "of the Securities Exchange Act of 1934," "which holds that the Federal Courts shall have exclusive jurisdiction of violations of this chapter * * *."[1]

---

[1] *See also* the American Arbitration Association which explicitly provide that *"the Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary."* (Emphasis supplied)—See Appendix—Exhibit B.

It is highly significant that respondents never cited these controlling rules of arbitration. There is no court decree that can obviate these barriers to impartial arbitration. Respondents are afraid to face courts and juries in the forums provided under clear and categorical statutory provisions for the protection of the petitioner.

Under the Federal Arbitration Act (9 U.S.C.—Sections 10 and 11, the Court's power to review an award is extremely limited in scope.

Judge Goddard said in his opinion in the District Court that:

"Arbitration ought not to prevail where it would clearly defeat the *urgent* policy considerations as expressed by Congress in the Securities Act. In view of the informality of the arbitration proceedings and the restricted court review, see United Fuel Gas vs. Columbian Fuel Corp., 165 Fed. (2d) 746 C.C.A. 4; Burchell vs. Marsh et al, 58 U.S. 344; Title 9, U.S.C. and Sections 10, 11 there is no certainty that the rights of the purchaser accorded him by Section L would be wholly protected in an arbitration proceeding."

In the United Fuel Gas Co. case, the Court held that "Parties cannot by contract oust federal courts of their statutory jurisdiction."

(10) In holding that the Securities Act of 1933 does not evidence a public policy which forbids referring the instant controversy to arbitration.[1]

C. C. A.'s Judge Clark held that "such a course would have neither a usual or a safe and proper method of draftsmanship. The language chosen is broad and general as befits the intent. It seems wholly adequate and effective to safeguard the investor against loss of his right of suit under the act and the important burden of proof which it grants in his favor." And later * * * "Because I believe important rights under this notable first of a series of famous Acts for the benefit of the investing public should not be capable of nullification by long fine-print restrictions of the broker's devising, I think the ruling below wise and beneficent. I would affirm."

Kaiser-Frazier Corp. vs. Otis & Co., 195 Fed. 2d 838, 843-4, 6, the Court declared at page :

> "the obvious purpose of the Congress in its enactment was the protection of the investing public.

The Securities and Exchange Commission on pages 23-4 of their brief on appeal to the C.C.A. for the 2d Circuit state:

> "(1) That respondents herein present a tortuous argument to the effect that the phrase 'compliance with' applies to the broker and not to the customer. It is elementary law that no one except the contracting party himself can waive his contractual rights" and further on the same page (23) of the brief of the Securities and Exchange Commission to the Circuit Court of Appeals herein; the Commission says: "Section 12(2) of the 1933 Act does require that the fraudulent seller be responsible for the wrong and

[1] In holding that the ruling of the C. C. A. for the Third Circuit in the case of *Donahue* vs. *Susquehanna Collieries Co.*, 160 Fed. 2d 661 C. C. A. 3 (1947) was relevant herein. The Supreme Court's attention is drawn to the fact that case arose from transactions in *coal*, and from legislation pre-dating the Securities Act of 1933 and not from transactions in *securities* for which Congress has made special provisions in Section 771 and 77n of the Securities Act of 1933.

the injury to the purchaser in a court proceeding. . . . Waiver of customer's remedy is thus in a very material respect a waiver of the requirements of Section 12(2) and citing the Kaiser-Frazier—Otis case supra, the General Counsel of the SEC says: "Section 14 is broad in scope and sufficiently broad, we believe, to apply to the waiver which Appellants sought to obtain from the instant plaintiff."

(12) Reasons for Granting the Writ.

The Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this court.

The writ sought herein should be granted because there are direct conflicts with decisions in other Circuit Courts of Appeals. And is probably in conflict with the applicable decisions of this Court. The majority of the C. C. A. herein have so far departed from the accepted course of judicial proceeding as to call for an exercise of the Supreme Court's power of supervision.

One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions within the Federal Courts and particularly within the various Circuit Courts of Appeals.

No claim or evidence was ever adduced by respondents herein to the effect that they had ever submitted the customers' agreement herein to either the Securities and Exchange Commission or the New York Stock Exchange for consideration and approval. The Securities and Exchange Commission is charged by law with the administration of certain statutes that have become settled law. It maintains an interpretative division to render opinions to the public and the legal profession.

There is a conflict between the ruling of the majority of the C. C. A. herein and the expressed intent of Congress at the time of enacting the remedial legislation.

Judge Goddard's opinion of May 25, 1952 citing holds clearly to the opposite of respondents the clear expression

of the intent of the Senate and the House of Representatives at the time the Securities Act of 1933 was being considered in Washington.

Judge Goddard made it crystal clear that the intent of Congress was that "the provisions of the Securities Act of 1933 should be strictly complied with so that the purchaser of securities would be protected as fully as possible" and that Congress made no change in Section 771 of the 1933 Act at any later date.[1]

Judge Goddard further made it clear that "many purchasers of securities would not hesitate to sign a printed form in small type which includes a provision for arbitration, thereby waiving the remedies provided by the Securities Act of 1933, particularly as few purchasers are aware of the provisions of the Securities Act" of 1933. "A collateral agreement of this nature would nullify the Act's basic purpose and allow the purposes of Congress to be circumvented."

Judge Goddard further said:

> "In the Senate report on the bill it was said:
>
> It is now *imperative* that the Federal Government shall adopt measures looking to the protection of the purchasers of securities in interstate commerce." (Emphasis added) Senate Report No. 47, 73d Cong. 1st Sess. 1933 Page 2.
>
> "The House Committee report stated:
>
> Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance. The responsibility imposed is no more than nor less than that of a trust. It is a responsibility that no honest banker and no honest business man should seek to avoid or fear. *To impose a lesser responsibility would*

[1] See pages 27-29 from Transcript of Record.

*nullify the purposes of the legislation.*" H. R. Rep. No. 85, 73d Cong. 1st Sess. (1933) pages 9-10.

Judge Goddard further says:

"In the light of this background of Congressional purpose, the liabilities provision of Section 77l and the anti-waiver provision of Section 77n were enacted, and they must be construed accordingly and may not be disregarded. The serious concern which the Congress had for the protection of the investor is evident. It provided a court remedy for the purchaser, and it was deemed essential that a part of the burden of proof should rest on the seller."

There is a conflict between the majority of the C. C. A. for the 2d Circuit and its minority member Judge Clark herein.

The highest Court of this country is respectfully referred to Judge Clark's dissenting opinion in which he holds correctly that "The role of the burden of proof concept is to canalize and control the evidence; it may often be the decisive factor in the case"—and infra—"the arbitrators will act according to their business background and there will be no way of checking what they do." * * * "So what is most desirable in the ordinary arbitration becomes a clear loss of a statutory right here." (See page 52 of Transcript of record herein.)[1]

There are conflicts between the majority opinion of the C. C. A. for the 2d Circuit and decisions reached in the following cases in the same and other circuits:

(1) With the Second Circuit itself in the cases of American Almond Products vs Consolidated Pecan Sales Co., Inc., 144 Fed 2d, 448 et seq, 154 A. L. R. 1205, C. A. 2d—1944

Shanferoke Coal and Supply Corp vs Westchester Service Corporation, 70 Fed 2d 297, 299 (C. A. 2d 1934) affirmed, 293 U. S. 449, (1935)

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[1] . . . "The Burden of Proof has been characterized as a matter of Substance." See Moore's Federal Practice (2d ed. 1951) Volume 5 ¶43.08 and cases cited therein.

(2) With the Third Circuit in the case of Donahue vs. Susquehanna Collieries Co. 138 Fed 2d 3 (C. A. 3—1943).

(3) With the Fourth Circuit in the case of United Fuel Gas Co. vs Columbian Fuel Corp., 165 Fed (2d) 746 (1948)

(4) With the Fifth Circuit in the case of Jefferson Lake Sulphur Company vs Walet 104 Fed Sup. 20, (1952); Cf. C. A. 5 Fed 2d (1953) decision handed down March 1953—as yet unreported.

There is a direct conflict in the decision of the majority of the C. C. A. for the Second Circuit and the decision of Judge Goddard in the United States District Court for the Southern District of New York. This is clearly evidenced by the filing of the appeal of the respondents herein.

The importance of the questions involved cannot be overestimated. Efforts to enforce compulsory arbitration affect nearly everyone who transacts business on nationally registered exchanges either as a customer or a broker. It affects the officers and employees of the exchange themselves as well as the staffs of Federal administrative agencies. This case does not turn on its own special facts or on consequences peculiar to the particular parties herein. It was considered of great importance to the Securities and Exchange Commission and sufficiently so to bring intervention as amicus curiae in both the District Court and the Circuit Court of Appeals.

The Securities and Exchange Commission in their brief filed with the Circuit Court of Appeals is in accord with Judge Clark and sums the dilemma up cogently and clearly when it says on page 31 of its brief: "It is evident that appellants' proposal subverts the very purpose of arbitration. And if the Court is to assume such detailed supervision, should it not try the case itself without the intervention of arbitration?"

Respondents in their brief on appeal quote excessively from English statutes and decisions. These quotations are

sheer surplusage, if not arrant *red-herrings*, as far as their relevance to the instant case is concerned. There was a revolution in 1776, and English law has been repealed or largely superseded by our own Federal and State statutes and decisions.

Quoting from the relevant paragraph on page 35 of the brief of the Securities and Exchange Commission on appeal to the Circuit Court of Appeals[1,2] we find the following excerpt from the Circuit Court's decision in the case of American Almond Products Co., vs. Consolidated Pecan Sales Co., Inc.,:

> "Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with THOSE PROCEDURAL LIMITATIONS WHICH IT IS PRECISELY ITS PURPOSE TO AVOID. THEY MUST CONTENT THEMSELVES WITH LOOSER APPROXIMATIONS TO THE ENFORCEMENT OF THEIR RIGHTS THAN THOSE THAT THE LAW ACCORDS THEM, WHEN THEY RESORT TO ITS MACHINERY." (Emphasis supplied)

(See opinion by Judge Learned Hand in above case.)

The majority of the Court of Appeals in the Second Circuit and respondent's counsel have specifically ignored the well-known fact that arbitrations are conducted by all the agencies mentioned in the customer's agreement only after the customer has signed an arbitration agreement containing the following or similar clause.

> "THE DECISION OF THE MAJORITY OF THE ARBITRATORS SHALL BE FINAL." (Emphasis supplied.)[3]

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1 144 Fed. 2d—448, 451, 154 A.L.R. 1205 C.A. 2d—1944.

2 *See also* Judge Augustus Hand's remarks in In Re Canadian Gulf Line, 98 Fed. 2d 711, 714. (C.A. 2—1938.)

3 See Arbitration Agreement New York Stock Exchange, page . See Appendix —Exhibit A, submitted herewith.

The majority of the C. C. A. for the 2d Circuit admits in its opinion herein that "the appeal presents an interesting question of statutory construction said to be of first impression." and admits further:[1]

> . . . "the brief of the Securities & Exchange Commission as amicus curiae . . . makes a strong presentation of the argument in support of Judge Goddard's decision."

The same majority also refers on the same page to Judge Goddard's "carefully reasoned opinion."

Later on the last page of Judge Swans opinion herein, he states "Although the question is not free from doubt, and Judge Goddard's opinion presents a strong argument against the conclusion we have reached . . ."[2]

Petitioner respectfully submits that the dissenting opinion of Judge Clark herein represents the correct ruling in this particular case. Judge Clark says at the beginning of his opinion:[3]

> "Judge Goddard's incisively reasoned opinion D. C. S. D. N. Y. 107 Fed. Supp. 75 and the able supporting arguments of the Securities and Exchange Commission are to me very convincing . . . " and infra . . . It would be vastly unfortunate if" (arbitration) "it became useable as a device to blunt or break social legislation."

To fail to grant the writ of certiorari to the petitioner herein would constitute a long step backward in the enforcement of federal statutes; back to the days before 1933 when the "lambs" were shorn regularly and continuously by the "wolves" of Wall Street.

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[1] See page 43 of Transcript of record herein.

[2] See page 46 of Transcript of record herein.

[3] See page 51 of Transcript of record herein.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

.....

Counsel for Petitioner.

# APPENDIX

## Exhibit A

For the arbitration of *future* disputes:—

The American Arbitration Association recommends the following arbitration clause for insertion in all commercial contracts:

### STANDARD ARBITRATION CLAUSE

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

For the Submission of *existing* disputes:—

We, the undersigned parties, hereby agree to submit to arbitration under the Commercial Arbitration Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) Arbitrators selected from the panels of Arbitrators of the American Arbitration Association. We further agree that we will faithfully observe this agreement and the Rules and that we will abide by and perform any award rendered by the Arbitrator(s) and that a judgment of the Court having jurisdiction may be entered upon the award.

EXHIBIT B.—Copy of page .... of Arbitration Agreement of American Arbitration Association.

*Evidence—*

The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses or documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and of all the parties except where any of the parties is absent in default or has waived his right to be present.